judgment of dismissal on the ground that respondent's discharge of petitioner was not "state action" is incomplete.

The Court of Appeals stated that in order to plead "state action," under such cases as *Powe* v. *Miles*, 407 F.2d 73, 81 (C.A. 2, 1968), the state must be shown to be involved, not simply with some activity of the defendant institution charged with inflicting injury, but with *the* activity that caused the injury. The court held that in this case ". . . plaintiff's allegations at most concern Pacific Bell's public service functions; they neither show nor tend to show an intrusion by the State into matters of Pacific Bell's internal management. Plaintiff's discharge, of course, comes under the latter head." (441 F.2d 1116, 1118).

ARGUMENT

The record presents no federal question which will govern other cases, but merely a unique pleading matter of interest only to the parties. There is no conflict in the opinions of lower federal courts as to applicable legal standards.

The opinion of the Court of Appeals was confined to reviewing the legal sufficiency of the particular allegations of the proposed amended complaint to ascertain whether the alleged wrongful discharge by respondent of one of its employees constituted "state action" under 42 U.S.C.A. § 1983.

With respect to a factual showing that respondent's employees responsible for petitioner's discharge

were acting under the authority or color of any state statute, ordinance, regulation, etc., and that state action was involved, petitioner's proposed amended complaint was limited to the following allegations:

"III

"Defendant is a Washington corporation authorized to do and doing business in the state of Oregon and in Tillamook County, a subdivision thereof, and is a public utility within the definition of ORS 757.005 and as such is subject to the regulatory powers of the state of Oregon acting by and through its Public Utility Commissioner under the provisions of ORS Chapters 756, 757 and 758; defendant has been allocated certain service areas by or with the acquiescence of the Public Utility Commissioner, particularly including Tillamook County, and exercises in such areas an economic monopoly protected by the state of Oregon; defendant is afforded by the state of Oregon protection and guarantees in respect to rates for services and rates of return on its investment and facilities; defendant is entitled and allowed by the state of Oregon to exercise certain governmental rights and privileges not available to non-public-utility businesses, including but not limited to use of public property for its facilities and services and the exercise of power to condemn private property for its own use; defendant provides facilities and services of a public nature as a matter of public convenience and necessity."

. . . . .

"IX

"Defendant, in committing the act of dis-

> charging plaintiff and the other acts heretofore set out, has deprived plaintiff of his First Amendment right to the free exercise of religion and has denied him Equal Protection of the Laws and Due Process, and defendant so acted under color of state law clothed with the authority of the state of Oregon as a public utility having the character, powers and privileges alleged and set forth in Paragraph III hereof, contrary to the provisions of the Act of April 20, 1871, C. 22, § 1, 17 Stat. 13." (R. pp. 18-19, 20).

A review of the above allegations reveals that petitioner's cause of action under 42 U.S.C.A. § 1983 for damages on account of alleged wrongful discharge from private employment rests upon the bald proposition that because a public utility performs its public service functions under the rules and regulations of a state agency (Public Utility Commissioner of Oregon), pursuant to various Oregon statutes regulating the activities of public utilities, the discharge of an employee by other company employees involves "state action" protected by the First and Fourteenth Amendments.

This contention is not only unsupported by authority, but is also contrary to reason and logic. On this record, it is clear that respondent is a private corporation operating in Oregon as a public utility. There is no claim that under any Oregon statute or regulation of the Public Utility Commissioner it is treated, legally or otherwise, as an agency of the state. Also, there is no claim that in discharging petitioner, re-

spondent's employees were acting as agents of the state, or were clothed with power by the state to take the wrongful action alleged.

To the contrary, the record is clear that the alleged action taken by respondent was done by individual employees of a private corporation, not acting pursuant to, or under the color or authority of, state law.

Since the Fourteenth Amendment and the implementing Civil Rights legislation are directed only against state action, it is axiomatic that 42 U.S.C.A. § 1983 does not afford protection against activities of individuals not acting pursuant to, or under the color or authority of, state law. In this case, petitioner's pleadings utterly failed to show what this Court has defined as action taken under color of state law in *United States* v. *Classic*, 313 U.S. 299, 326 (1941), as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law * * *."

The decision in *Kadlec* v. *Illinois Bell Telephone Company*, 407 F.2d 624 (C.A. 7, 1969), cert. den. 396 U.S. 846, relied upon by the court below, is closest in point. That case involved a customer who sued under 42 U.S.C.A. § 1983 for violation of constitutional rights arising out of alleged wrongful termination of service. The court of appeals affirmed the district court's dismissal of the second amended complaint for failure to state a cause of action. The court held (407 F.2d at pp. 626-627):

"It is well-settled that in order to establish a claim for damages under § 1983 of the Civil Rights Act the conduct complained of must have been engaged in under color of law and such conduct must have infringed upon the rights, privileges or immunities secured to the complaining party by the Constitution or laws of the United States. Haldane v. Chagnon, 9 Cir., 345 F.2d 601, 603 (1968); Duzynski v. Nosal, 7 Cir., 324 F.2d 924, 930 (1963); Jemzura v. Belden, N.D. N.Y., 281 F. Supp. 200, 205-206 (1968).

"At least one of the two elements essential to maintaining a claim under § 1983 is missing in the instant case. Under the facts of this case, we are of the opinion that defendant telephone company was not acting under the authority or pretense of any Illinois state statute, regulation, custom or usage in discontinuing plaintiffs' Call-Pak service. Thus, the second amended complaint, as amended, was properly dismissed by the district court for failure to state a cause of action under § 1983.

"Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, requested or cooperated in this suspension of service.

"The mere filing of these regulations with the state neither clothed Illinois Bell with state authority nor did it bring it under the aegis of the state. The § 1983 requirement of conduct taken under color of law '. . . can rarely be satisfied

in the case of anyone other than a state official.' Jobson v. Henne, 2 Cir., 355 F.2d 129, 133 (1966); Weyandt v. Mason's Stores, Inc., W.D. Pa., 279 F. Supp. 283, 288 (1968). Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983.

"We have carefully reviewed the cases cited by plaintiffs in support of their contention that defendant telephone company acted under color of law. These cases are readily distinguishable from the instant case and are not controlling. In all of the cases cited where conduct under color of law was found to be present, there existed greater state involvement or control than is alleged in this case."

Many other federal cases can be cited in support of this well-settled rule that a private corporation which operates its facilities pursuant to a franchise or license, in accordance with state law, cannot be classified as an agency of the state; and that the conduct of its agents or employees in managing its internal affairs does not constitute "state action" within the purview of 42 U.S.C.A. § 1983 (*Watkins* v. *Oaklawn Jockey Club*, 86 F. Supp. 1006, 1016 (W.D. Ark. 1949), aff'd. 183 F.2d 440, 443 (C.A. 8); *Miner* v. *Commerce Oil Refining Corporation*, 198 F. Supp. 887, 891 (D.R.I. 1961), rev'd on other grounds 303 F.2d 125 (C.A. 1, 1962); *Williams* v. *Yellow Cab Co. of Pittsburgh, Pa.*, 200 F.2d 302, 307 (C.A. 3, 1961), cert. den. 346 U.S. 840; *Rosee* v. *Board of Trade of City of Chicago*, 311 F.2d 524 (C.A. 7, 1963), cert.

den. 374 U.S. 806; *Barnes* v. *Atlantic Transit System,* 144 F. Supp. 156, 158 (N. D. Ga. 1956); *Craska* v. *New York Telephone Company,* 239 F. Supp. 932, 935 (N.D. N.Y. 1965); see also: *Fullerton* v. *Monongahela Connecting Railroad Company,* 242 F. Supp. 622, 624 (W.D. Pa. 1965); *Motley* v. *Virginia Hardware and Manufacturing Co.,* 287 F. Supp. 790, 793 (W.D. Va. 1968); *Elders* v. *Consolidated Freightways Corp. of Delaware,* 289 F. Supp. 630, 633-635 (D.C. Minn. 1968); *Curtis* v. *Peerless Insurance Company,* 299 F. Supp. 429, 434 (D.C. Minn. 1969); *Winterthaler* v. *Three Rivers Motor Company,* 312 F. Supp. 962, 963 (W.D. Pa., 1970)).

Under the foregoing authorities, the court below was correct in following Judge Friendly's delineation in *Powe* v. *Miles,* 407 F.2d 73, 81 (C.A. 2, 1968), that "* * * the state action, not the private action, must be the subject of complaint."

This principle is well illustrated by the opinion of the Court of Appeals for the Tenth Circuit in *Browns* v. *Mitchell,* 409 F.2d 593 (C.A. 10, 1969), where the court affirmed the dismissal of a suspended private university student's suit for injunctive relief in the nature of reinstatement under the Civil Rights Act. The appellate court held that the disciplinary acts of the University of Denver did not constitute action under color of state law. The court also dismissed the claim that because areas of the university's property were dedicated to use by the public, this gave the university the color of a public institution and, therefore,

the action complained of was done under color of state law. In rejecting this concept, Chief Judge Murrah wrote (p. 596):

> "The students in our case suggest that the various conventional public services and functions performed by the University give it the color of a public institution and thus may be likened to the company town in Marsh, and the public way in Logan Plaza. From this they seem to rationalize that the disciplinary action complained of was done under color of state law, hence amenable to due process and a violation of civil rights. Superficially, this line of thought has some appeal but it is specious and wholly untenable. We may concede, without deciding, that judged by the totality of its public functions this University may be likened to Marsh and Logan Plaza for the purpose of exercising First and Fourteenth Amendment rights in its public ways. But that is as far as the rationale of these cases takes us.
>
> "Marsh and Logan Plaza were concerned only with the delineation of public places for purposes of First Amendment activities. They were not concerned with state action in the internal affairs of these enterprises. There is nothing in the logic of these cases to support the notion that the owner-employers in either case could not dismiss an employee without due process, or that such action could, in any sense of the word, be deemed state action. . . ."

By analogy to the case at bar, it is clear that even though respondent's properties are dedicated to service of the public, there is no support for the no-

tion that the telephone company ". . . could not dismiss an employee without due process, or that such action could, in any sense of the word, be deemed state action."

CONCLUSION

Petitioner's counsel has made no claim in this Court, nor in the Court of Appeals, that any further facts could be alleged in an additional amended pleading that would correct the obvious deficiency in petitioner's proposed amended complaint.

The Court of Appeals has found that the district judge acted in the exercise of a proper discretion in refusing to allow the filing of an amended complaint which also failed to plead an enforceable claim under 42 U.S.C.A. § 1983.

On the record before the Court, there is no substantial federal question, no legal issue of public importance, and no conflict between circuits.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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